

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-215537 **DATE:** February 1, 1985

MATTER OF: Summit Air Conditioning and Heating, Inc. ANT 00151

DIGEST:

Protest based on alleged deficiencies which were apparent to protester before bid opening is untimely under GAO Bid Protest Procedures, § 21.2(b)(1), when filed with agency after bid opening even though protest with GAO was filed within 10 working days after protester learned of agency's denial of its protest.

Summit Air Conditioning & Heating, Inc. protests the award of a contract to The Riley Corporation under invitation for bids (IFB) No. FO8650-84-B-0058, issued by the Department of the Air Force for the replacement of oil and gas burners at Patrick Air Force Base. Summit contends that the Air Force's response to its request for clarification of the specifications misled Summit into bidding a higher price than it would have otherwise.

We dismiss the protest.

The procurement is for replacement of combination gas/oil burners in existing boilers. After receiving the IFB, Summit asked for clarification of the specifications because the specifications referred to a military specification for boilers, not burners. Shortly thereafter, Summit received an amendment which, among other things, deleted the second sentence of the paragraph of the boiler specification dealing with the burners and associated controls. Summit also received a written response to its request for clarification which stated that the boiler specification had been used intentionally and referred Summit to the second (deleted) sentence of the specification. Summit contends that although it was confused by the reference to the deleted sentence, the five days left before bid opening did not permit another round of correspondence which would be necessary for further clarification. Summit therefore alleges that it based its bid price on "using the more expensive Mil Spec burner." The bid opening revealed that of the nine bids received, Riley was low with a price of \$20,414 and Summit was second low with a price of \$21,390.

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The day after bid opening, Summit protested to the agency stating that it had based its price on the military specification and expressing its belief that the low bidder could not have based its price on this specification. The agency denied the protest, although it conceded that its clarifying response to Summit had "possibly" been misleading because the agency's intention was to delete the second line of the specification and not the second sentence.

Summit's protest is untimely. Under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed before bid opening. The deficiencies of which Summit complains were apparent prior to bid opening. While there may not have been enough time for another round of correspondence after Summit received the agency's confusing clarification, there was enough time for Summit to protest either to the agency or to our Office prior to bid opening. An initial protest that has not been filed in a timely manner with an agency will not be considered by GAO even if it is filed within 10 days of the agency's denial of the protest. 4 C.F.R. § 21.2(a).

We point out that Summit's concern, that the low bidder based its bid on less stringent requirements than did Summit, appears to be without merit; the Air Force reports that the more stringent military specification requirements were intended and that the low bidder states that it did base its bid on those requirements.

The protest is dismissed.

Ronald Berger
for Comptroller General
of the United States